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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934. No. 30.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, *Appellant*,

v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

BRIEF FOR APPELLEES

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

WM. A. SCHNADER,
Attorney General of the Commonwealth of Pennsylvania.
HARRIS C. ARNOLD,
Deputy Attorney General.
Attorneys for Appellees.

State Capitol,
Harrisburg, Pa.

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v.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania, September Term, 1932, No. 7395, in equity. Opinion March 29, 1934 (R. 50).

BRIEF FOR APPELLEES

CORRECTIONS OF APPELLANT'S STATEMENT OF THE CASE

The statement of the case as set forth in appellant's brief is, on the whole, accurate, but in order to avoid any possible confusion, we feel obliged to note certain necessary corrections.

Near the bottom of page 3 of appellant's brief appears the following statement:

> "* * * the pictures were permitted * * * to remain * * * with the understanding that they would be returned to Clarke **in New York** at any time on his request."

There is absolutely no justification for the presence of the phrase "in New York," in this statement.

On page 4, appellant says:

> "It is customary for public museums to secure exhibitions in this manner, and the period for which the Clarke collection was held by the Museum prior to his death was shorter than the usual period of such loans."

This is rather a loose paraphrase of the statement made in Paragraph 10 of the Bill of Complaint (R. 5) that "such accommodation loans of works of art [to the Pennsylvania Museum] * * * have been continued for an average period considerably longer than the period from the date of the original loan in question to the death of the said Thomas B. Clarke."

ARGUMENT

I

SUMMARY OF ARGUMENT

With certain exceptions, not important here, tangible personal property is subject to inheritance taxation in the State in which it has its situs at the time of the death of its owner. This is true without regard to the domicile of the owner.

Appellant's attempt to deny this principle is groundless and its effort to confine application of the principle to personal property which appellant designates as "part of an established local business" or "intimately connected with real estate" has no foundation in law and is based on an entirely fanciful distinction of fact.

Moreover, since that question was not raised in or passed upon by the court below, it is too late to raise it here.

The real issue is whether the paintings here in question had an actual situs in Pennsylvania when Thomas B. Clarke died. That was the only issue in the court below.

At the time of Mr. Clarke's death, his collection of paintings was in Pennsylvania. It had been here for almost three years. During that time it had been offered for sale to any buyer who would give it to the Pennsylvania Museum, Philadelphia, for permanent exhibition. While the collection was returnable to Mr. Clarke on demand, he never, during the three-year period, made any definite arrangements to remove it

from Philadelphia. He had given up the storage space in New York in which most of the paintings had been kept prior to their removal to Philadelphia.

Under these circumstances we contend that the paintings had an actual situs in Pennsylvania when Mr. Clarke died and were taxable by, and only by, this State.

There is no decision of this court to the contrary; and certain apparently adverse language in decisions which are not relevant on their facts, was uttered without reference to a situation such as this.

To say that a state can tax tangible personal property within its borders only if the property is located there permanently in the strict sense of that word, would exempt from taxation the great bulk of such property.

II

IN GENERAL TANGIBLE PERSONAL PROPERTY IS TAXABLE WHERE IT IS FOUND

Generally speaking, tangible personal property is taxable where it is, regardless of the owner's domicile.

Of course, a state cannot impose a property tax on tangible property *in transitu* through the state or upon property which has come to rest within the state

for a fleeting time, the owner having a present intention promptly to remove it. These propositions do not require the citation of authority.

Possibly, property necessary for the transaction of certain types of business is not subject to the general rule which we have stated. We have in mind vessels, rolling stock of railroads, dredging equipment, road-building machinery, and the like. See HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 (1855); PULLMAN'S PALACE CAR COMPANY v. PENNSYLVANIA, 141 U. S. 18 (1891); UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905); NEW YORK EX REL. NEW YORK CENTRAL & HUDSON RIVER RAILROAD v. MILLER, 202 U. S. 584 (1906); JOHNSON OIL REFINING CO. v. OKLAHOMA, 290 U. S. 158 (1933); the dissenting opinion in GROMER v. STANDARD DREDGING CO., 224 U. S. 362 (1912); COMMONWEALTH v. AMERICAN DREDGING COMPANY, 122 Pa. 386 (1888); CAPITAL CONSTRUCTION CO. v. DES MOINES, 211 Iowa 1228, 235 N. W. 476 (1931). Such property must be moved from place to place to enable the owner's business to be carried on. It would be extremely inequitable, to say the least, to enable the property to be taxed wherever it had come to rest; in the course of a year the property might become subject to taxation in a number of jurisdictions.

But, where the property involved is not of such a nature that its very use necessitates its movement from place to place, we submit that it is taxable where it has come to rest for an indefinite time.

Also, it is axiomatic that tangible personal property cannot be taxed by a state if the property has been permanently removed from the state: DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. v. PENNSYLVANIA, 198 U. S. 341 (1905); UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905).

1. Authorities for the General Rule

To establish the general rule which we have stated, we cite FRICK v. PENNSYLVANIA, 268 U. S. 473 (1925), and BLODGETT v. SILBERMAN, 277 U. S. 1 (1928).

In the FRICK CASE, Mr. Frick having been domiciled in Pennsylvania, that State attempted to levy an inheritance tax upon property of his estate, as follows (page 487): (1) Rare paintings, rugs, furniture, bronzes, porcelains, and other art treasures housed in a building in New York City especially constructed for the purpose; (2) Furniture, household furnishings, automobiles, tools, etc., in Mr. Frick's New York house and garage; and (3) Paintings, household furnishings, farming implements, etc., on Mr. Frick's estate at Prides Crossing, Massachusetts.

This court held that the property was beyond Pennsylvania's taxing power.

There was no discussion, in the opinion, of the question whether the property was "permanently" in New York and Massachusetts. The essence of the court's de-

cision was stated by Mr. Justice Van Devanter, at page 489:

> "* * * as respects tangible personal property having an actual situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the domicil of the owner. * * *"

At page 491, after discussing and quoting from UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905), and UNITED STATES v. BENNETT, 232 U. S. 299 (1914), Mr. Justice Van Devanter said:

> "Other decisions show that the power to regulate the transmission, administration, and distribution of tangible personal property on the death of the owner rests with the state of its situs, and that the laws of other states have no bearing save as that state expressly or tacitly adopts them,—their bearing then being attributable to such adoption, and not to any force of their own. * * *"

And at page 492:

> "* * * Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states,—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states, and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts.

> In these respects the situation was the same as if the property had been immovable realty. * * *"

In the BLODGETT CASE Connecticut attempted to impose an inheritance tax on bank notes and coin which belonged to a resident of Connecticut but at his death were in a safe deposit box in New York. This court held that Connecticut could not impose the tax.

At page 18, Chief Justice Taft said:

> "* * * But we think that money, so definitely fixed and separated in its **actual situs** from the person of the owner as this was, is tangible property and can not be distinguished from the paintings and furniture held in the Frick Case to be taxable only in the jurisdiction where they were."

In that case the decision was based upon the mere presence of the money in New York.

Under the principles enunciated in these decisions, New York could not tax the Clarke paintings; Pennsylvania could tax them.

2. Intangible Property Tax Cases

Repeatedly this court has said that the rules relating to the taxation of tangible property are different from those governing the taxation of intangible property: FRICK v. PENNSYLVANIA, supra, at page 494; UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194, 206 (1905).

Therefore, the intangible property tax cases cited by the appellant as the basis for its argument have little, if any, importance here.

Some of these cases are now relied upon by the appellant, because of certain expressions in the opinions, not necessary to the decisions. Other cases of the same type were cited by appellant in the court below and in its brief filed in this court when the case was here before, but they have been dropped from its present brief.

In SAFE DEPOSIT & TRUST CO. OF BALTIMORE v. VIRGINIA, 280 U. S. 83 (1929), this court did state that "tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place". We repeat, that proposition is axiomatic. However, it does not follow by any means that the converse is true and that a state may tax tangible personal property within its borders only if the property is permanently located there.

And, in any event, the facts of the case show that the word "permanently" was not used in its ordinarily strict sense. The court ruled that certain securities held in trust in Maryland by a Maryland corporation could not be made the subject of taxation by the State of Virginia, which was the domicile of the beneficiaries of the trust. At page 92, the court said that these securities had "a permanent situs for lawful taxation" in Maryland. But, by the express terms of the trust,

the trust res would become the property of the Virginia beneficiaries at a fixed time some years thereafter. Therefore, it is obvious that the term "permament situs" was not used to mean location within the state in such a manner that the property could never be removed. On the contrary, there was a definite time fixed when it would become the property of residents of Virginia, and, as it was intangible property, it would then be taxable only at the domicile of the owners: First National Bank of Boston v. Maine, 284 U. S. 312 (1932).

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930), is cited by the appellant for the proposition that a state cannot tax tangible property which has been permanently removed from its borders. This cannot be disputed.

First National Bank of Boston v. Maine, 284 U. S. 312 (1932), is cited for the proposition that personal property is immune from taxation by more than one state at the same time or for the same period. This also is conceded, but has no importance here.

It is our position that the Clarke collection is not subject to inheritance taxation by New York and Pennsylvania, but is subject to such taxation only by Pennsylvania. There is no question of double taxation here. If appellant has paid a tax to New York, it did so voluntarily and with knowledge of the claims of Pennsylvania. That payment did not determine

that New York had a legal right to exact the tax. We have no doubt that the presence in this court of the Tax Commission of New York as *amici curiae* both when this case was here before and on the present appeal indicates that New York has no intention of refusing to refund the tax already paid if this court determines that the paintings are taxable by Pennsylvania.

The appellant also emphasizes the quotation from the opinion in First National Bank of Boston v. Maine, that, as respects tangible personal property, "The rule [*mobilia sequuntur personam*] has gradually yielded to the law of the place where the property is kept and used."

Why this is important to the appellant we fail to see. The Clarke pictures were kept in Pennsylvania, and used in Pennsylvania. They certainly were not being kept or used in New York.

3. Cases Involving Vessels, Rolling Stock, etc.

We shall now briefly discuss the cases dealing with the taxability of vessels, railroad rolling stock and the like.

In Hays v. Pacific Mail Steamship Co., 58 U. S. 596 (1855), California sought to tax ocean-going vessels, plying between New York, San Francisco and other ports. New York was the registered home port of the

vessels. The vessels merely touched the port of San Francisco to discharge and take on cargoes, and to receive such attention as was necessary to enable them to proceed. The duration of the stay was usually ten or twelve days.

This court held that "the State of California had no jurisdiction over these vessels for the purpose of taxation."

On the other hand, where ships have been used and kept only within the boundaries of a single state for a number of years, they do acquire a taxable situs there: OLD DOMINION STEAMSHIP CO. v. VIRGINIA, 198 U. S. 299 (1905).

In NEW YORK EX REL. NEW YORK CENTRAL & HUDSON RIVER RAILROAD v. MILLER, 202 U. S. 584 (1906), the State of New York was permitted to impose a franchise tax on all the property of the railroad, including all of its cars. This court held it immaterial that some if not all of the cars, spent a part of the tax year in other states; but it did "not appear that any specific cars or any average of cars was so continuously in any other state as to be taxable there" (p. 597).

In GROMER v. STANDARD DREDGING CO., 224 U. S. 362 (1912), Porto Rico was permitted to tax dredging equipment used in the harbor of San Juan for fulfilling a contract with the United States Government. At page 372, Mr. Justice McKenna said:

> "The fact is not alleged, and no other fact which removed the property from the application of the rule that tangible personal property is subject to taxation by the state in which it is, no matter where the domicil of the owner may be * * *."

In UNION TRANSIT CO. v. KENTUCKY, 199 U. S. 194 (1905), Kentucky sought to tax cars permanently located in other states, and employed in such states for the purposes of the owner's business. This court held that the tax could not be imposed.

In PULLMAN'S PALACE CAR COMPANY v. PENNSYLVANIA, 141 U. S. 18 (1891), this court had before it the question of the taxability of cars operated by the Pullman Company on railroads extending in and through Pennsylvania. Pennsylvania had levied a capital stock tax against the company, based on a calculation of the average number of cars employed in the State, the company being a foreign corporation.

Although the constitutional objection to the tax was that it constituted a burden on interstate commerce, the court was obliged to determine whether property of the company, namely cars, had a taxable situs in Pennsylvania, in spite of the fact that they ran on lines which extended beyond the borders of the State.

This court ruled that the company had and used property which was sufficiently within the jurisdiction of Pennsylvania to give it a taxable situs there. The

following excerpts from the opinion are pertinent here (p. 22):

> "'* * * A nation within whose territory any personal property is **actually situate** has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.'
>
> "For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the **place where it is**, although not the place of his own domicil, and even if he is not a citizen or a resident of the State which imposes the tax. * * *"

In distinguishing the facts of the PULLMAN CASE from earlier cases concerning taxability of ships in foreign ports, (*e. g.* HAYS v. PACIFIC MAIL STEAMSHIP CO., 58 U. S. 596 [1855]), Mr. Justice Gray said (141 U. S. at p. 23) that the ships were not taxable because they were not "in any proper sense, abiding within" the limits of the state in which the foreign port was located.

JOHNSON OIL REFINING CO. v. OKLAHOMA, 290 U. S. 158 (1933), also concerned the taxation of railroad cars moving in and out of a state at frequent intervals. This court permitted a state other than the state of the owner's domicile to tax the cars, but limited the right in such a manner as to be "consistent with the like jurisdiction of other states." That expression can have no application to the present case. We have here

no question of divided or overlapping jurisdictions. If Pennsylvania may tax these pictures, New York may not.

In COMMONWEALTH v. AMERICAN DREDGING Co., 122 Pa. 386 (1888), the Supreme Court of Pennsylvania held that tug boats, scows and dredging machinery are taxable at the domicile of the owner. The court rested its decision squarely on the ground that (p. 391):

> "* * * From the nature of the business, it [the equipment of the dredging company] is in one place to-day and in another to-morrow, and, hence, not taxable in the jurisdiction where temporarily employed. * * *"

COMMONWEALTH v. UNION PACIFIC R. R. Co., 214 Ky. 339, 283 S. W. 119 (1926) represents another aspect of the special rules which the courts apply to taxation of railroad cars under our complicated system of transportation.

Even these cases, dealing with tangible personal property which must be moved from place to place to enable its owner's business to be carried on, adhere very closely to the general rule that actual situs, not domicile of the owner, is the test of the right to tax. In the cases in which the state of the domicile was permitted to tax the property, the property did not have an actual situs in any other state. This was clearly the situation in HAYS v. PACIFIC MAIL STEAMSHIP Co., NEW YORK EX REL. ETC., v. MILLER and COMMONWEALTH v. AMERICAN DREDGING Co.

4. The General Rule Applies to Inheritance Taxes

In the court below the issue was whether the portraits here involved had acquired a taxable situs in Pennsylvania, and the court disposed of the case on that basis. There was never a suggestion from the appellants that it was their theory of the case that tangible personal property cannot under any circumstances be subject to inheritance taxation except at the domicile of the owner. All parties assumed that tangible property could have a situs for inheritance tax purposes apart from the domicile of the owner, and the case was submitted to the court on that theory. The only question was whether there was such a situs here.

Appellant now attempts to raise a new issue in this court. In the first three subdivisions of its brief, it argues to the effect that in no case may inheritance tax be constitutionally imposed on the transfer of tangible personal property except at the domicile of the owner, and that the situs of the property is of no importance.

Since this represents a substantial change of the theory on which the case was tried in the court below, we submit that under accepted principles of appellate practice it is now too late to raise the question, and that the case should be considered here on the issues which were raised in the court below and passed upon by it: UNITED STATES v. LA FRANCA, 282 U. S. 568,

576 (1931); 2 R. C. L. 182 Sec. 156; 1 R. C. L. Perm. Supp. 363; 3 C. J. 718.

The appellant's entire argument on this point centers about its assumption (See appellant's brief p. 14) that tangible personal property passes to legatees solely by virtue of the law of the state of the testator's domicile even though the property has an actual situs in another state at the time of his death. In support of it, appellant quotes from the tentative draft of the Restatement of Conflict of Laws, and from EIDMAN v. MARTINEZ, 184 U. S. 578, 591 (1902). It contends from these authorities that the law of the state of the domicile operates to transfer the title under the will of the owner by its own force and independently of the law of the state of the situs of the property. That proposition is not sustained by the cases cited. The farthest extent to which they go is to say that property in another state passes in accordance with the law of the state of domicile **because the state of situs recognizes and permits application of the law of the state of the domicile.** Even on the strongest statement of the proposition contained in the appellant's authorities there must be taken into consideration the fact that the state of the situs of the property has jurisdiction of the property itself. The law of domicile applies only because of consent of the state of the situs. And necessarily that consent is subject to the exercise of such powers of the sovereign state of the situs as that state may choose to exercise. The primary fact is that the state of situs has jurisdiction

of the property itself. Therefore, if it consents to the application of the law of the domicile, it may and does condition that consent upon recognition of the exercise of its own sovereign power to tax.

However, the form in which the appellant argues as to the effect of the law of the domicile on devolution of tangible personal property in another state, as well as its whole proposition on this point, is in direct conflict with the clear declarations of this court in FRICK v. PENNSYLVANIA, 268 U. S. 473 (1925), supra.

In the FRICK CASE the actual decision was that tangible personal property is not subject to inheritance taxation at the domicile of the owner, if the property has its situs in another state, because such property is taxable only in the state of its situs. In addition to the passages herein before quoted from the opinion in the FRICK CASE, the following portions of the opinion of Mr. Justice Van Devanter are pertinent:

> (Page 490) " 'The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectable, is so cogent an argument for its taxation at its situs, that of late there is a general consensus of opinion that it is taxable in the state where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicil of the owner.' "

(Page 492) "* * * Here the tax was imposed on the transfer of tangible personalty having an actual situs in other states,—New York and Massachusetts. This property, by reason of its character and situs, was wholly under the jurisdiction of those states, and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. **The jurisdiction possessed by the states of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer.**

"Mr. Justice Story said in his work on Conflict of Laws, section 550: 'A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property.' * * *" (Bold face ours).

(Page 493) "In support of the tax, counsel for the state refer to statutes of New York and Massachusetts evidencing an election by those states to accept and give effect to the domiciliary law regulating the transfer of personal property of owners dying while domiciled in other states; and

from this they contend that the transfer we are considering was brought under the jurisdiction of Pennsylvania, and made taxable there. We think the contention is not sound. The statutes do not evidence a surrender or abandonment of jurisdiction, if that were admissible. On the contrary, they in themselves are an assertion of jurisdiction and an exercise of it. They declare what law shall apply, and require the local courts to give effect to it. And it should be observed that here the property was administered in those courts, and none of it was taken to the domiciliary state. **Obviously the accepted domiciliary law could not, in itself, have any force or application outside that state. Only in virtue of its express or tacit adoption by the states of the situs could it have any force or application in them. Through its adoption by them it came to represent their will, and this was the sole basis of its operation there.** Burdick, American Const. section 257. In keeping with this view, New York and Massachusetts both provide for the taxation of transfers under the adopted domiciliary law; and they have imposed and collected such a tax on the transfer we are now considering.

* * * * *

"We think it follows from what we have said that the transfer of the tangible personalty in New York and Massachusetts occurred under and in virtue of the jurisdiction and laws of those states, and not under the jurisdiction and laws of Pennsylvania, and therefore that Pennsylvania was without power to tax it." (Bold face ours).

Appellant seeks to avoid the effect of the FRICK CASE by trying to confine its application to personal

property which "was an essential part of the establishment," or was "intimately connected with real estate" or "property so annexed to or associated with real estate as to be for practical purposes a part of the realty" (appellant's brief, pages 21, 23, 34). We are at a loss to perceive how any course of reasoning could deduce such a principle from the opinion in the FRICK CASE. The property involved in the FRICK CASE included paintings, rugs, furniture, bronzes, porcelains and other art treasures not unlike the property here in question, and also ordinary furniture, household furnishings, automobiles, tools and farm implements (268 U. S., at page 487). A suggestion that such a widely diversified list of personal property including, particularly, automobiles, is so intimately connected with real estate as to be part of the real estate, is too fantastic to merit further attention.

Therefore, we submit that the general rule of taxation above stated applies to inheritance as well as other taxes and that the only issue before this court is whether the circumstances of this case show that the portraits in question had acquired an actual situs in Pennsylvania at the time of the death of Mr. Clarke.

5. What is Taxable Situs?

A true description of the requisites for the acquisition of a taxable situs is set forth in 2 COOLEY ON TAXATION (4th Ed.), Section 452, page 982, as follows:

> "In order to acquire a situs in a state or taxing district so as to be taxable in the state or district

> regardless of the domicile of the owner and not taxable in another state or district at the domicile of the owner, tangible personal property must be **more or less permanently** located in the state or district. * * *"

And again, after pointing out that property in transit does not acquire a situs within the state until the transit has ended, the author says (pages 987-988):

> "A more difficult question arises where the transit element is wanting or is subordinate, as where personal property comes into a state to be kept there or used there for a considerable period of time but with no intention perhaps of keeping it there permanently. The governing rule, as usually stated, is that the taxable situs depends on whether the property is 'permanently' within the state. However, in this connection, the word 'permanently' is apt to be misleading unless read in connection with the facts of the particular case. **It means a more or less permanent location for the time being.** * * *"

On this point, BLACKSTONE v. MILLER, 188 U. S. 189 (1903), is important. We realize that it has been overruled insofar as it held that intangible property could be taxed elsewhere than at the owner's domicile. But it is still a precedent on the question of the acquisition of a taxable situs.

This court decided in that case that money collected by a New York agent of a resident of Illinois, and held by the agent in its bank in New York subject to order of the owner, was subject to an inheritance tax in New

York upon the death of the owner while domiciled in Illinois.

Concerning the acquisition of a taxable situs in New York, Mr. Justice Holmes said (page 203):

> "* * * It is probable, of course, that he [the non-resident owner] did not intend to leave the fund there forever, and that he was looking out for investments, but he had not found them when he died. * * *
>
> "* * * We also must take it to have been found that the property was not *in transitu* in such a sense as to withdraw it from the power of the state, if otherwise the right to tax the transfer belonged to the state. **The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year,** so that this finding at least was justified. * * *"

The foregoing language aptly applies to the present case. Here the indefinite time had lasted for almost three years.

When speaking of the taxability of tangible property, Mr. Justice Holmes said (page 204) that it may be taxed "wherever the property is found."

The BLACKSTONE CASE is authority for the proposition that property left in a state other than the state of the owner's domicile for an indefinite time,—in that case, only a year,—acquires a taxable situs, even though the owner did not intend to leave the property

there forever, but only while he arranged for further disposition of it.

We earnestly submit that the FRICK CASE, BLODGETT v. SILBERMAN and other authorities cited make it clear that tangible personal property, other than that peculiarly useful for mobile pursuits, is taxable in the state in which it has come to rest for an indefinite time.

III

THE CASES CITED AS APPLIED TO THIS CASE

We have discussed not only the cases upon which we rely, but also those cited in opposing briefs.

How do the cases cited apply to the facts involved in the present case?

We submit that HAYS v. PACIFIC MAIL STEAMSHIP CO., NEW YORK EX REL. NEW YORK CENTRAL ETC., RAILROAD v. MILLER, JOHNSON OIL REFINING CO. v. OKLAHOMA, COMMONWEALTH v. AMERICAN DREDGING COMPANY, and COMMONWEALTH v. UNION PACIFIC R. R. Co., are wholly inapplicable. Ocean vessels, railroad rolling stock, dredging equipment, and road-building machinery, going from state to state, must be treated as a special class of property for which special rules must be provided.

However, even though they involved these special classes of property PULLMAN'S PALACE CAR COMPANY

v. PENNSYLVANIA and GROMER v. STANDARD DREDGING Co., are authorities sustaining Pennsylvania's right to tax the Clarke paintings.

As the Clarke paintings were not permanently outside of Pennsylvania on the date of Mr. Clarke's death, the decisions in DELAWARE, LACKAWANNA & WESTERN RAILROAD CO. v. PENNSYLVANIA and UNION TRANSIT CO. v. KENTUCKY are of little value in determining whether **Pennsylvania** could tax the paintings. But the former case is authority for the proposition that **New York** could **not** tax the collection.

In the D. L. & W. CASE the coal had been shipped out of Pennsylvania to be sold. It could be returned to that State, but the possibility was remote.

After the Clarke collection reached Pennsylvania it was offered for sale provided it should be left by the buyer at the Pennsylvania Museum for exhibition. If sold, it could not go back to New York.

The FRICK CASE and BLODGETT v. SILBERMAN deny New York's right to tax, and, therefore, sustain Pennsylvania's right.

In the FRICK CASE, the household furniture, automobiles, tools, etc., in the New York house and garage and at Prides Crossing, Massachusetts, could readily be interchanged with property of a similar nature in Mr. Frick's Pennsylvania home. They were movable property.

There is no distinguishing feature here. Mr. Clarke's pictures were in Pennsylvania. There was **presently** no other place for them. They might have been returned to New York if Mr. Clarke had seen fit to procure a place to put them, but he did not do so. Had the pictures been sold, under the option given by Mr. Clarke, they would have remained in Pennsylvania.

Pennsylvania was not permitted to tax the tangible personal property in the Frick houses in New York and Massachusetts. New York could not validly tax the Clarke collection.

In BLODGETT v. SILBERMAN the currency was in New York. Therefore Connecticut could not tax it.

In this case, the pictures were in Pennsylvania. Therefore, New York could not tax them.

Appellant's efforts to distinguish the BLODGETT CASE on page 25 of its brief, on the ground that the money in that case had never been permanently located in the state of the owner's domicile is baseless. In the first place, none of the cases set up any such standard. Secondly, the pictures in this case were not "permanently" located in New York. If they had been, they could never have come to Pennsylvania. If appellant means that they had been "permanently" located in New York because their stay there had been indefinitely prolonged with no immediate intent of the owner to take them elsewhere, we agree, for by the same standard, after the owner had moved them from

New York, they were "permanently" located in Pennsylvania.

In neither the FRICK CASE nor the BLODGETT CASE was there any discussion about the **permanency** of the presence of the property where it was found on the date of the owner's death. It was taxable where it was, and not taxable by the state of the owner's domicile.

COMMONWEALTH v. CLYDE STEAMSHIP CO., 268 Pa. 278, 281 (1920), involved no question of situs. The statement quoted on page 23 of appellant's brief is from an opinion of a lower court and is made simply with respect to a case cited by counsel.

SAFE DEPOSIT & TRUST COMPANY OF BALTIMORE v. VIRGINIA, FARMERS LOAN & TRUST CO. v. MINNESOTA and FIRST NATIONAL BANK OF BOSTON v. MAINE do not apply to this case because they involved the taxability of intangible,—not tangible,—property.

IV

DISCUSSION OF THE FACTS

We repeat that nowhere in the record is there any justification for the statement which occurs in opposing briefs that Mr. Clarke at any time intended that his paintings should be returned to New York. He had made a loan, not a gift. Therefore, the paintings were to be returned to him, but there is nothing

to show that he had a definite intention that they should go back to New York.

Appellant's analogy to a return trip ticket (Brief p. 37) is not at all apt. The Philadelphia Museum was bound to return the pictures to Clarke wherever he might have required. The pictures were to be returned to a person, not to a place. The trip of four pictures to Virginia was scarcely consistent with the theory of a round trip ticket from and to New York.

Mr. Clarke, immediately upon making the loan, gave up the storage space where most of the paintings had been kept while in New York. This is eloquent evidence of his intention to keep the pictures in Pennsylvania for an indefinite time.

About a year after the loan was made (R. 36), Mr. Clarke gave to the Director of the Pennsylvania Museum in Philadelphia what amounted to an option to buy his entire collection. However, he made it a condition that the purchaser must present the collection to the Pennsylvania Museum at Philadelphia. Obviously, this option contemplated that the paintings would remain permanently in Philadelphia.

This option continued from about March, 1929, to July 17, 1930. Thereafter, until the time of his death on January 18, 1931, Mr. Clarke was willing to dispose of his pictures to any purchaser who would buy the collection as a whole for presentation to the Pennsylvania Museum or to a substantially similar institu-

tion and who would pay the price set upon it by Mr. Clarke (R. 36).

Such a sale would certainly not involve the return of the paintings to New York unless the "substantially similar institution" might happen to be a New York institution.

In April, 1929, four portraits were sent from Philadelphia to Richmond for exhibition. In May of the same year they were returned, not to New York, but to Philadelphia. That was their situs for the time being.

When Mr. Clarke died, the pictures were in Pennsylvania, where they had been for two years and ten months.

Under these facts there cannot be a doubt that for at least a year and ten months prior to Mr. Clarke's death, his paintings had been in Pennsylvania under conditions indicating that they might never be returned to New York.

The District Court gave careful consideration to all these facts and to the pertinent cases, and then found as the ultimate fact (R. 56) that at the time of the death of Mr. Clarke, these pictures had an actual situs in Pennsylvania. We submit that this finding was entirely correct.

We do not argue that the pictures were "permanently" in Pennsylvania. As the court below pointed

out, the term "actual situs" does not necessarily include an idea of permanency, "and in the true sense, permanency of location can never be predicated of personal property" (R. 51).

But the pictures were located in Pennsylvania for an indefinite time. They had an actual situs here. They were commingled with other property of a like character in Pennsylvania. They were housed and exhibited in a great public museum with other valuable works of art. They were being protected by Pennsylvania. As between New York and Pennsylvania, Pennsylvania is the state which had the power to tax them at the time of Mr. Clarke's death.

If it be argued that under the decisions it must be shown that the property was being "kept and used" in Pennsylvania, the facts meet that test. The paintings were kept in Pennsylvania, and they were used here for the only purpose for which paintings can ever be used.

It is interesting to reflect that before the paintings came to Pennsylvania, most of them were in storage. They had been kept in New York, but not used.

If there is any importance attached to the fact that on several occasions Mr. Clarke "suggested" that his collection be returned (R. 5), and, if these suggestions can be construed as declarations of intention to return the paintings to New York, they were, when not carried out, what are known in the law of domicile as mere floating intentions and, as such, were not sufficient to

shift the situs for taxation from Pennsylvania back to New York. See GILBERT v. DAVID, 235 U. S. 561, 569 (1915); DORRANCE'S ESTATE, 309 Pa. 151, 172 (1932), certiorari denied, 288 U. S. 617 (1933).

Suppose Mr. Clarke had leased a property in Philadelphia from month to month, and had moved his paintings into the leased property, and, under his own name had exhibited them, either free or for an admission fee. Suppose that the exhibition had lasted for almost three years, and that during the course of it, Mr. Clarke had offered the collection for sale to anyone who would agree not to move the paintings out of Philadelphia.

Could anyone doubt that under these circumstances, the property would have been subject to the jurisdiction of Pennsylvania; that the property would have had an "actual situs" here?

The real facts are equally as strong.

There is no doubt that, in the language of COOLEY, the paintings were "more or less permanently" located in Philadelphia "for the time being."

The presence of the pictures in Pennsylvania was as permanent as any location of personal property is likely to be. It was of a decidedly more permanent character than the presence of the securities in Maryland in SAFE DEPOSIT & TRUST CO. OF BALTIMORE v. VIRGINIA, more permanent than the location of the funds in New

York in BLACKSTONE v. MILLER, and more permanent than the Pullman cars in the PULLMAN CASE.

The pictures were "actually situate" in Pennsylvania; they were "abiding within" its limits; they constituted "property found within its jurisdiction."

V

CONCLUSION

The defendants have a right, as officers of Pennsylvania, to tax any tangible personal property which has an actual situs in that State; and

The Clarke collection of paintings under the facts set forth in the pleadings and the stipulation of counsel, had an actual situs in Pennsylvania on the date of Mr. Clarke's death.

Therefore we respectfully submit that the decree of the District Court should be affirmed.

WM. A. SCHNADER,
Attorney General.

HARRIS C. ARNOLD,
Deputy Attorney General.

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IN THE

Supreme Court of the United States

October Term, 1934. No. 30.

CITY BANK FARMERS TRUST COMPANY, Executor under the Will of THOMAS B. CLARKE, Deceased, *Appellant*,

vs.

WILLIAM A. SCHNADER, Attorney General of the Commonwealth of Pennsylvania, and LEON D. METZGER, Secretary of Revenue of the Commonwealth of Pennsylvania, *Appellees*.

MOTION ON BEHALF OF THE TAX COMMISSION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*, and BRIEF.

SETH T. COLE,
Counsel for
Amici Curiæ.

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